SENG YIP v. PUBLIC PROSECUTOR

[A. Cr. J. (Thomson C.J.) October 14, 1960]

[K. L. — Selangor Criminal Appeal No. 58 of 1960]

Prevention of Crime — Undesirable person — Police supervision and restriction "within doors" — Failure to comply — Prevention of Crime Ordinance, 1959, s.15(2) (f) and (4).

Section 15(2)(f) and (4) Prevention of Crime Ordinance reads as follows:

"(2) Any person placed under the supervision of the police by order made under this section shall also be subject to all or any of the following restrictions, as the Minister may by order direct —

(f) he shall remain within doors, or within such area as may be defined in the order, between such hours as may be specified in the order, unless he obtains special permission to the contrary from the Officer in Charge of the Police District;

(4) A registered person who contravenes or fails to comply with any order or restriction imposed on him under this section shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding five years and not less than two years."

The appellant was subjected to an order by the Minister for Home Affairs under the Prevention of Crime Ordinance to Police supervision and other restrictions, *inter alia*, to remain "within doors" between 7 p.m. and 6 a.m. unless he obtained special permission to the contrary from the Officer in Charge of the Police District. On July 16, 1960 he was found in Maxwell Street, Kuala Kubu Bahru at about 8.30 p.m. and he was accordingly prosecuted under section 15(4) of the Ordinance. He was convicted and sentenced to 2 years' imprisonment.

Held: (1) on the facts, the appellant was clearly guilty of the offence, and in view of the very clear wording of the section the appeal against conviction should be dismissed;

(2) in a proper case even where there is a minimum sentence provision an offender may be put on probation, but before it can be considered whether a case should be dealt with under section 173A or section 294 of the Criminal Procedure Code (Cap. 6) it is necessary to inquire whether it falls fairly and squarely within the terms of the section in question.

Case referred to:—

(1) *Public Prosecutor* v. *Lee Lam* [1952] M.L.J. 86.

CRIMINAL APPEAL.

Dato' R. P. S. Rajasooria for the appellant.

Raja Abdul Aziz (Deputy Public Prosecutor) for the respondent.

Thomson C.J. (delivering oral judgment): This appellant was convicted for an offence in contravention of section 15(2)(f) of the Prevention of Crime Ordinance.

That Ordinance is said to be one for the prevention of crime, which is a very laudable object, but it contains some very drastic provisions which I think are unparalleled anywhere else and whether or not it will achieve its purported highly laudable object is something which remains to be seen.

The Ordinance provides in effect for the setting up of a Register of undesirable persons and then it provides that once a person attains the horrid distinction of appearing on that Register, the Minister for Home Affairs can make an order subjecting him to Police supervision and subjecting him at his discretion to a number of other restrictions. One of these is that he shall remain within doors between such hours as may be specified in the order unless he obtains special permission to the contrary from the Officer in charge of the Police district.

This present appellant had what may or may not have been the misfortune to become an object of the exercise of the Minister's powers and an order was made against him and served on him in June, 1959, which among other things required that he should remain "within doors" (whatever that may mean) between 7 p.m. and 6 a.m. unless he obtained special permission to the contrary from the Officer in charge of the Police District of Kuala Kubu Bharu.

On 16th July, 1960, the appellant was found in Maxwell Street, Kuala Kubu Bharu, at about 8.30 p.m. and he was accordingly prosecuted under sub-section (4) of section 15 which says that any registered person who contravenes or fails to comply with any order or restriction imposed on him under this section shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding five years and not less than two years. He was convicted and sentenced to two years' imprisonment.

It is against that conviction and sentence that he now appeals.

It has been said that this is a test case. With great respect to counsel for the appellant I disagree. I can quite see that at some future date some very important questions of law may arise under this Ordinance. I do not think, however, that they arise in this particular case.

The prosecution story is that the appellant was first observed some time after 7 p.m. in a coffee shop at No: 9 Maxwell Street, Kuala Kubu Bharu, which in the nature of things cannot be far from his place of residence which is No: 7 in the same street. After various comings and goings finally he left the coffee shop. He was seen to speak to one or two people in the street and he was then arrested at about 8.30 p.m.

On the face of that he was clearly guilty of the offence. He was found otherwise than within doors after 7 p.m. and prior to 6 a.m.

His story, which did not materially differ from although it added to the prosecution evidence, was to the effect that some time in the early evening, prior to 7 p.m., he felt some sort of a pain in his stomach and that he went to a Chinese medicine shop at No: 17 Maxwell Street, which cannot be very far from his place of residence or from the coffee shop. This seems to be corroborated by the medicine shop proprietor who said he bought 90 cents of some sort of Chinese patent medicine. That, the appellant said, did not relieve his pain and he went to get hot water. For some reason he went for this hot water to the coffee shop at No. 9 Maxwell Street and not to his own home which was either next door or next door but one. The hot water apparently did not achieve the beneficent purpose which he had hoped it would achieve and he thereupon set out to the Police Station with a view to asking if he could be taken

to hospital. While still on his way he was approached by a policeman who arrested him and who by reason of language difficulties was unable to understand his story to the effect that he had a pain in the stomach, a story which I should have thought could have been conveyed in spite of any language difficulties by means of gestures.

That story, it has been argued, constituted some sort of defence. Now, I have no intention of taking this case too far. I have no intention of attempting to answer the question whether the general exceptions under the Penal Code are available in prosecutions of this nature. My personal view is that they are but I am not prepared to state that as a firm view without hearing argument and I do not think it arises in this case. Nor am I concerned with the hypothetical case of a man subject to a Minister's order of this sort who finds his house on fire or finds himself in the throes of some sudden agony and leaves his house to seek relief. These questions will have to be dealt with if and when they arise.

Here, however, no such issue arises on the evidence even if it be stretched to the utmost in favour of the appellant and in view of the very clear wording of the section the appeal against conviction must therefore be dismissed.

As regards sentence, we have here a minimum sentence and of course all these minimum sentence provisions are highly objectionable not so much because they deprive the Court of the discretion which it should have in dealing with offenders but because they constitute a constant temptation to Judges and Magistrates to evade the wording of the law.

My own view, following the view of Wilson J. in the case of *Public Prosecutor* v. *Lee Lam*[1], is that in a proper case even where there is a minimum sentence provision an offender may be put on probation. But before it can be considered whether a case should be dealt with under section 173A or section 294 of the Criminal Procedure Code it is necessary to inquire whether it falls fairly and squarely within the terms of the section in question.

In my view the present case does not fall within the scope of either section and the appeal against sentence must therefore be dismissed.

Appeal dismissed.

HO GIOK CHAY v. NIK AISHAH

[O. C. J. (Hepworth J.) November 10, 1960]

[Kota Bharu — Originating Summons No: 71 of 1959]

Land Laws — Malay Reservation land — Charge over such land in favour of non-Malay — Validity of — Kelantan Land Enactment, No. 26 of 1938 — Kelantan Malay Reservations Enactment, No. 18 of 1930 — Malay Reservations (Amendment) Ordinance, No. 25 of 1954 (F.M.).

The applicant, who claimed to be a "native of Kelantan" within the meaning of the definition section (section 2) of the Land Enactment, but not a Malay, obtained 3 charges in succession from the respondent, a Malay, over her land, which was Malay Reservation land, to secure repayment of certain loans made to her. The charges were duly registered under the provisions of the Land Enactment. The respondent having defaulted in payment of principal moneys and interest secured by the 3 charges the applicant took out a summons to shew cause why the land should not be sold for realisation of the debts and for an order for sale. The respondent contended that the charges were null and void as being contrary to the Malay Reservations Enactment.

Held: (1) section 7(i) of the Malay Reservations Enactment precludes a non-Malay from acquiring any right or interest in reservation land (other than leases for limited periods) by transfer or transmission nor can any such right or interest be vested in a non-Malay;

(2) the power given to a chargee under section 136 of the Land Enactment to compel sale of charged land creates a right to or interest in the land in favour of the chargee; the word 'transfer' has a wide meaning and comprehends a transfer by way of assignment, security or otherwise; and, therefore, a charge under the Land Enactment transfers or vests a right or interest to or in the land in the chargee; otherwise a charge would be valueless and of no effect, the essential element being that the chargee is entitled to reimburse himself out of the land, that is to compel payment of the amount due by sale of the land itself;

(3) section 9A(i) of the Malay Reservations Enactment incorporated by Federal Ordinance No. 25 of 1954 lifts the prohibition against charging reservation land in favour of some defined persons who are non-Malays, the object of the amendment being to remove the absolute fetter created by section 7(i);

(4) the applicant not being within the exempting provisions of section 9A, the charges are null and void under section 12(i) of the Malay Reservations Enactment.

Semble: the power reserved to a chargee by section 127(i) of the Land Enactment to enter upon the charged land to view and inspect the state of repair of buildings and improvements thereon is indicative of a right or interest in land within the meaning of section 7(i) of the Malay Reservations Enactment.

Cases referred to:—

(1) *Gathercole* v. *Smith* 17 Ch. D. 1.
(2) *In re Combined Weighing Co.* 43 Ch. D. 99.
(3) *Re Lord's Settlement* [1948] L.J.R. 207; [1947] 2 All E.R. 685.
(4) *Coverdale* v. *Charlton* 48 L.J. Q.B. 132.
(5) *Gan Khor* v. *Soan bin Pelita* [1935] M.L.J. 158; [1935] F.M.S.L.R. 39.
(6) *Attree* v. *Hawe* (1878) 9 Ch. D. 337.
(7) *Re Harris* (1880) 15 Ch. D. 561.
(8) *Jervis* v. *Lawrence* (1883) 22 Ch. D. 202.

SUMMONS.

Lee Saik Kee for the applicant.

S. A. Lingam for the respondent.

Hepworth J.: The respondent is the registered proprietor of the land held under Grant No. 1 for Lot No. 21 section 3 Kota Bharu Town in the State of Kelantan together with the dwelling houses erected thereon and known as Nos. 1745 and 1746. This land is situated within a Malay Reservation and the respondent is a Malay.

On the 28th April, 1955, the respondent purported to execute a Memorandum of Charge for $3,000 over the said land in favour of the applicant Ho Giok Chay who resides at Jalan Sultanah Zainab, Kota Bharu in the State of Kelantan. Again on the 8th August, 1955, the respondent purported to execute a second Memorandum of Charge for $4,500 over the said land in favour of the applicant. And again on